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JOHN F. DAVIS, CLE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

ETITION NOT PRINTED
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No. 815

ELMER DAVIS, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED MARCH 8, 1965
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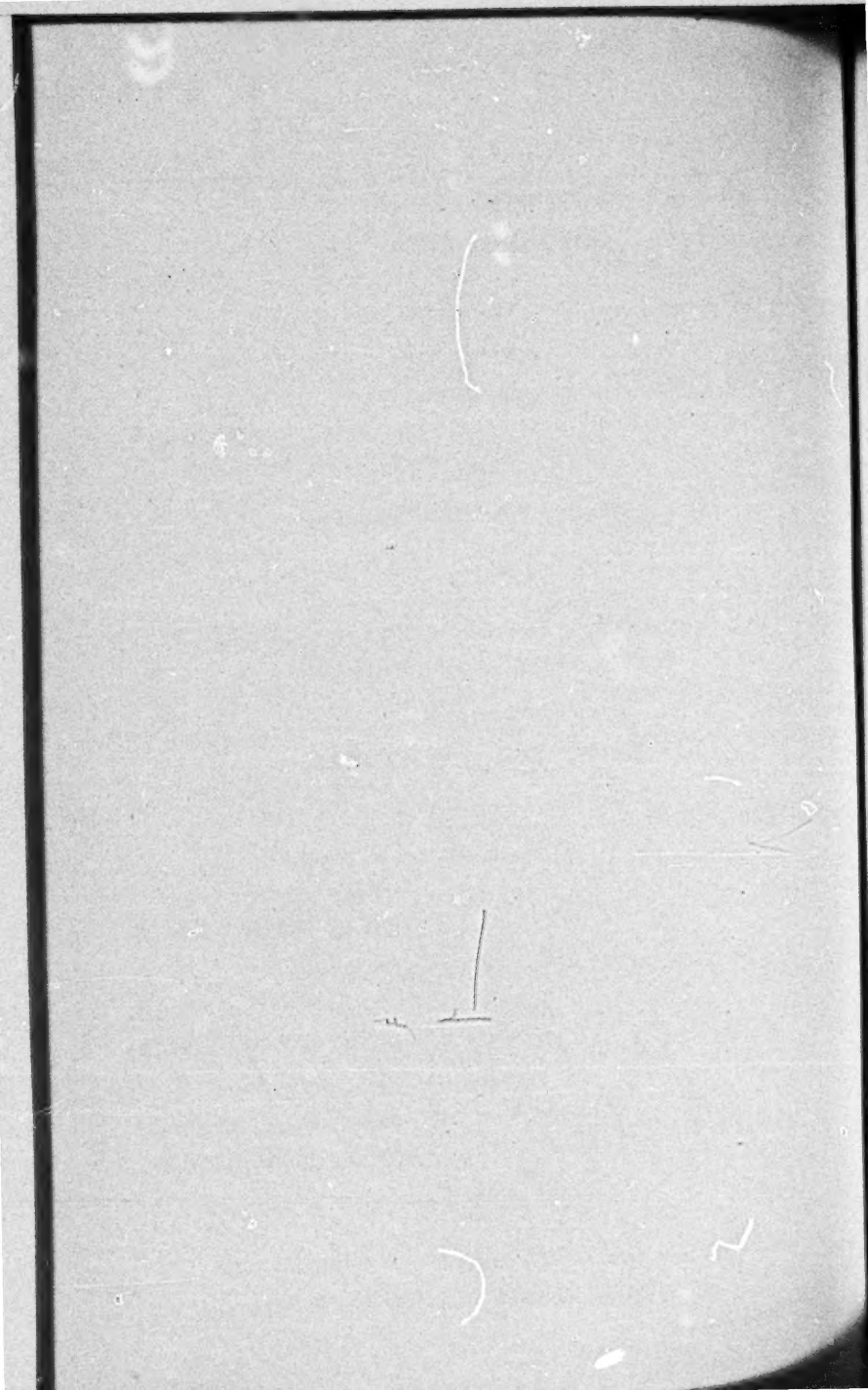

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The opinion of the Fourth Circuit Court of Appeals may be found in the printed record, p. 373.

Jurisdiction I

On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—December 13, 1965.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 815 and placed on the summary calendar.

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BRIEF FOR PETITIONER

Statement of the Case

Appellant was indicted in the Superior Court of Mecklenburg County, Charlotte, North Carolina for purportedly murdering Mrs. Foy Bell Cooper in the perpetration of a felony, to wit: rape (Murder in the first degree).

The jury returned a verdict of "guilty", and the judgment of the Court was that the petitioner was to die in the gas chamber at Central Prison, Raleigh, North Carolina.

The Appellant appealed to the North Carolina Supreme Court where the judgment of the lower Court was affirmed. (253 N. C. 86)

The Appellant filed a petition for rehearing in the North Carolina Supreme Court and the petition was denied.

The Appellant filed a petition for certiorari in the United States Supreme Court and the petition was denied.

The Appellant thereafter filed a petition for a Writ of Habeas Corpus in the Eastern District Court, Raleigh, North Carolina and the petition was denied.

On appeal to the Fourth Circuit Court of Appeals, the case was remanded to the District Court for a hearing after which the petition was again denied. Petitioner appealed to the Fourth Circuit Court of Appeals and the decision of the District Court was affirmed with Chief Judge Sobeloff and Judge Bell dissenting.

This case is before this Court on a Petition for Certiorari.

Statement of Facts

Appellant, an illiterate Negro and an escaped convict, was arrested on September 23, 1959 in Belmont, North Carolina, Gaston County, the county adjoining Mecklenburg County, and was turned over to the city police in Charlotte, North Carolina where he was held in the city jail incommunicado from said date until he confessed on October 6, 1959 to the murder of Mrs. Foy Bell Cooper whose dead body was found in a cemetery in Charlotte, North Carolina on the 20th day of September, 1959.

In the records of the arrest of the appellant, there was found an arrest sheet which gave instructions that the prisoner was not to talk to anyone nor was he permitted to use the telephone, (R.p. 110). Three of the officers, James W. Porter, Lt. Gilliland and Mr. Holmburg, went to

Belmont in the adjoining county and picked up the prisoner and it is admitted that one of them made out the arrest sheet ordering the prisoner to be held incommunicado and in explaining the mechanics of the arrest made, Captain John W. Yandell explained that "one copy of the arrest sheet is sent to the jailer and he governs himself accordingly". (R.p. 43).

The prisoner was held in jail for sixteen days and questioned constantly; taken out on various excursions in chains day and night, given two meals a day which consisted of two sandwiches each, and was not allowed to communicate with counsel or friends until after he had involuntarily confessed.

Questions Involved

1. Was the confession made by the Petitioner a voluntary confession as required by the Fourteenth Amendment to the United States or was it made under such circumstances that would vitiate the same as a coerced confession?

2. Was the Petitioner herein held incommunicado and denied his right to counsel in derogation of his rights under the Fourteenth Amendment to the United States Constitution?

ARGUMENT

The District Court Erred in Failing to Issue the Writ of Habeas Corpus and in Failing to Order Appellant Discharged From Custody Under the Death Sentence.

Petitioner, Elmer Davis, Jr., is being unconstitutionally restrained of his liberty because the confession relied upon to convict him was taken in derogation of petitioner's rights under the Fourteenth Amendment. The use in a state criminal trial of a defendant's confession obtained by coercion whether physical or mental is forbidden by the Fourteenth Amendment. See: *Brown* v. *State of Mississippi*, 297 US 278, 56 S. Ct. 461; *Linsenba* v. *People of State of California*, 314 US 219, 62 S. Ct. 472. Mr. Justice Frankfurter referring to coerced confessions and speaking for the majority in *Watts* v. *Indiana*, 338 US 49, 69 S. Ct. 1347 (1949) said, "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

The case at bar is simply another illustration of the use by the police of the custody of an accused to wring a confession from him. Here, the appellant, Elmer Davis, Jr., was arrested by the Belmont Police of Belmont, Gaston County, North Carolina on the 21st day of September, 1959

for being an escapee from a North Carolina Prison camp. The appellant on the same day was turned over to members of the Charlotte City Police Department for investigation of the murder of the late Foy Bell Cooper of Mecklenburg County, North Carolina. That the appellant was turned over to the Charlotte City Police Department for the sole purpose of interrogating him as to this murder is clearly shown by the conduct of the Charlotte police and by their arrest report of the defendant. See: *Petitioner's Exhibit No. 1,* (R.p. 110) which states that he was to be held in connection with this murder and was not to be allowed to see anyone or to use the telephone. Petitioner was then held by the Charlotte police from September 21 until October 6, 1959, a period of sixteen days, where he was forced to undergo prolonged and continuous questioning by a large staff of officers of the police department. Such relentless interrogation of petitioner continued for the entire period in which he was held, and ended only when the purported confession was obtained.

Numerous recent cases which deal with the question of the admissibility of confessions, point out that the very relentlessness of such prolonged interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. Such cases establish the principles that the turning of the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safe-guards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process. See: *Turner* v. *Pennsylvania,* 336 US 62, 69 S. Ct. 1352 (1949). *Harris* v. *South Carolina,* 338 US 68, 69 S. Ct. 1354 (1949).

The record clearly points up the fact that the statement of confession made by the petitioner was not volunteered. He testified himself that he was hungry, and when he asked to call his sister the officers placed him upstairs in a room all to himself where nobody could come up and see him (R.pp. 246-49).

Detective Fred Hucks verified the testimony of the petitioner (R.p. 318), where he states that the prisoner told him that he was hungry.

All of the officers deny that they violated the petitioner's constitutional rights when the facts show clearly otherwise. They attempt, however, to justify their conduct on the grounds that the prisoner was an escaped convict.

Captain John W. Yandell of the police department and custodian of the records said that one copy of the police report was given to the jailer and he is to govern himself accordingly (R.p. 43).

Captain W. A. McCall who is in charge of the detective division testified that he assigned the whole detective division of between 26 and 29 men to this case, and while he stated that he did not direct them to investigate or interrogate the prisoner periodically, his statement, "I talked to him, Mr. Gardner talked to him and Mr. Porter talked to him and Lt. Sykes talked to him. They talked to him at intervals when he would furnish information", suggest that there was some organized method of interrogating the prisoner and that his will was finally overcome.

It should be constantly borne in mind that Captain W. A. McCall was head of the detective division of the Charlotte Police Department and that his division was in charge of

investigating this case, and that while all of the officers deny the authorship of the arrest sheet, Captain McCall made it clear in no uncertain terms that he did not want the petitioner to see anybody, talk to anybody or communicate with any of his friends, relatives or legal advisor (R.p. 89). He attempts to justify isolating the petitioner on the grounds that he was an escaped convict and not entitled to visitors without permission of the North Carolina State Prison Warden, who could not grant same as he was at his office in Raleigh. Appellant asks the Court to take judicial notice of the fact that committed prisoners have certain times to see visitors. At all times, Captain McCall admits that Elmer, a suspect, was being held for investigation of the murder of Mrs. Cooper. We contend that Captain McCall's testimony alone illustrates that Elmer Davis was held incommunicado and in direct violation of his constitutional rights, in that Captain McCall, being head of the detective division, was in a position to make his wishes known and carried out by all the officers who were investigating this case.

Captain McCall further admits that even though Mr. Hucks and Mr. Fesperman were the two (2) officers assigned to the case, all of the detectives in the bureau were assigned to it also, since it was a major case. Thus when Elmer testified that he was held without privilege of seeing his relatives, friends, or counsel; that he was held for sixteen days without proper food; that he was interrogated both day and night by relays of officers and that he was struck, cursed, and continuously threatened for a period of sixteen days without proper food; his testimony is corroborated by the testimony of the head of the detective division.

This case has most of the elements which have been ruled on by the United States Supreme Court, as elements sufficient in themselves to constitute a violation of the Fourteenth Amendment's prohibition against coerced confessions and denial of counsel. The following elements were brought out in the Habeas Corpus hearing:

(a) The petitioner testified that he was held sixteen days without privilege of communicating with relatives or friends and this testimony was verified by the testimony of his sister who testified that she went to the city jail twice to see the petitioner and each time she was turned away (R.p. 246 and R.p. 220).

(b) He was held without privilege of communicating with counsel (R.p. 110).

(c) He was only fed two (2) to four (4) sandwiches per day until he confessed and he was constantly hungry throughout this period (R.p. 252).

(d) During the entire period, he was constantly threatened and beaten and placed in fear of bodily harm (R.p. 249).

(e) He was forced to walk a distance of fourteen (14) miles while handcuffed and during a period when he had been held without adequate food (R.p. 277 and R.p. 278).

(f) He was interrogated day and night by a large number of police officers (R.p. 35).

(g) He was carried on trips to the cemetery both day and night to view the scene of the murder (R.p. 339).

(h) On the day he signed the statement, he had been prayed over by a police officer at a time that his resistance was low and his body weary (R.p. 285).

The historical facts as found by the District Court illustrate a complete disregard for evidence as produced by the petitioner. One dramatic example of this is the Court's finding of fact number six. The petitioner's sister, Eloise Stowe, testified of two (2) attempts to see her brother before he confessed, but each time she was turned away, yet the District Court found as a fact that the petitioner was not held incommunicado. The Court went further and found that petitioner would have been allowed visitors had they come, even though the testimony of Mrs. Stowe remained uncontroverted. The Court further disregarded the testimony of the chief of detectives (R.p. 89) when he stated that he did not want the petitioner to see anyone.

The District Court determined the admissibility of this so-called confession based on its finding of historical facts, yet there was no mention in the Court's finding as to the effects of the fourteen mile walk forced on the petitioner. As it appears from the record of hearing, there are numerous other instances where the petitioner's evidence, though uncontradicted, was either disregarded altogether or passed over lightly by the District Court.

The uncontroverted portions of the record of the District Court hearing disclose that the appellant's, Elmer Davis, Jr., written confession was obtained in an atmosphere of substantial coercion and inducement created by the statements and actions of the Charlotte Police Department. It is well established that the question in each confession case such as this is whether the defendant's will was overborne

at the time he confessed. It is also well established that the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort, and the only method to determine whether a confession has been obtained unconstitutionally is by an examination of all of the attendant circumstances and facts of the particular case. In other words a totality of the circumstances must be examined and considered by the Court.

Chief Judge Sobeloff, then on the Fourth Circuit, pointed out the following: "The undisputed length of detention exceeds that in Turner v. Pennsylvania, 338 US 62 (1949) (four nights and five days); or Fikes v. Alabama, 352 US 191 (1957) (five nights and five days); or Reck v. Pate, 367 US 433 (1961) (three nights and four days); or Culombe v. Connecticut, 367 US 568 (1961) (four nights and five days); or Haynes v. Washington, 373 US 503 (1963) (sixteen hours)."

As the United States Supreme Court said in *Reck* v. *Pate*, 81 S. Ct. 1541, 367 US 433 (1961), "we conclude that this total combination of circumstances is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear". The right to counsel was established in *Escobedo* v. *Illinois* where the Court took the view that the period of police interrogation following arrest and prior to charge was a "critical" stage, and compelled the exclusion from a state criminal trial of a confession obtained from Escobedo following police denial of his request

to consult previously retained counsel, *Escobedo* v. *Illinois*, 378 US 478 (1964), *Gideon* v. *Wainwright*, 372 US 335 (1963).

Conclusion

WHEREFORE, the appellant prays, on the basis of the foregoing, that the decision of the Fourth Circuit Court be reversed and remanded in order that the writ be granted and the appellant released from custody under his sentence of death.

Respectfully submitted,

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